No. 81-2308

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHNNY LAWRENCE CAPPS - - - Petitioner

vs.

COMMONWEALTH OF KENTUCKY - - Respondent

On Petition for Writ of Certiorari to
The Supreme Court of Kentucky

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I.

Whether Petitioner's constitutional right of due process was violated by trying Petitioner under Kentucky's Persistent Felon Statute which does not allow for the introduction of "mitigating" evidence.

II.

Whether the Prosecutor or Trial Court violated Petitioner's constitutional right if due process by failing to provide Petitioner with a piece of "exculpatory" evidence.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 81-2308

October Term, 1981

JOHNNY LAWRENCE CAPPS - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondent, Commonwealth of Kentucky, respectfully prays that Mr. Capp's petition for writ of certiorari be denied.

OPINION BELOW

Petitioner was adjudged guilty of first degree burglary and theft by unlawful taking of property of a value greater than $100.00 by judgment of the Henderson Circuit Court entered October 13, 1980. In this same judgment, Petitioner was found to be a first degree persistent felony offender thus causing his original sentences to be enhanced to twenty and ten years, respectively. (Transcript of Record, TR 340-341)

The Supreme Court of Kentucky reversed Petitioner's conviction for first degree burglary and the accompanying persistent felon enhancement. The felony theft conviction and the persistent felon conviction based thereon were affirmed. The Court's opinion did not discuss the issues presented by this petition, the Court stating that all issues not discussed were without merit. (See Appendix)

JURISDICTION

Petitioner invokes the jurisdiction of this Honorable Court pursuant to 28 U.S.C. 1257(3). The Commonwealth submits that Petitioner's constitutional rights have not been violated and he has not presented a case worthy of constitutional review.

CONSTITUTIONAL PROVISION INVOLVED

FOURTEENTH AMENDMENT

SEC. 1

". . . NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW;"

COUNTERSTATEMENT OF THE CASE

The Respondent, Commonwealth of Kentucky (Commonwealth), will briefly delineate only the facts of this case strictly relevant to the questions presented.

Prior to his trial, Petitioner moved to discover exculpatory evidence which either indicated Petitioner's innocence or potentially impeached a prosecution witness. (Transcript of Record, TR, 12-13)

At trial, Darrell Skaggs testified that Petitioner and his accomplice flagged him down as he drove along U.S. 60 on the day of the crime. Skaggs stated that he had never seen Petitioner before but nonetheless helped push Petitioner's stalled vehicle off the main highway while Petitioner steered. Skaggs recalled that Petitioner told him that Petitioner and his accomplice had just burglarized a house up the highway. (Transcript of Evidence, TE, Vol. III, 325-333)

Defense counsel then requested that the prosecutor turn over a piece of paper which contained some notes the prosecutor had apparently jotted down in his pretrial interview of Skaggs. The trial judge examined the paper, noted that the notes were sketchy and unsigned and ruled Petitioner had no right to their disclosue. (TE, Vol. III, 338-348) The notes were placed in the record nonetheless.

In the persistent felon phase of the trial, the prosecution proved that Petitioner was over twenty-one years of age at the time of the crimes, that he had four prior felony convictions, and that he had been discharged from at least one of the convictions in the last five years. (TE, Vol. VI, 829-850) The trial court ruled that Petitioner could not introduce "mitigating" evidence in the persistent felon phase of the trial, but Petitioner was allowed to recite the substance of the mitigating evidence he wished to introduce during his opening statement. (TE, Vol. VI, 809-814) The evidence itself was later placed in the record by avowal. (TE, Vol. VII, 940-974)

Other facts will be noted as necessary in the appropriate argument.

REASONS FOR DENYING THE WRIT

I.

The Kentucky Persistent Felony Offender Statute Is Not Unconstitutional and Petitioner Had No Constitutional Right to Introduce Evidence Concerning His Personal Circumstances.

Petitioner contends that the trial court, pursuant to the Kentucky persistent felon statute, KRS 532.080, violated his constitutional right of due process by refusing to allow him to introduce "mitigating" evidence, that is, evidence concerning Petitioner's personal circumstances. Petitioner challenges both the trial court's decision and the constitutionality of the statute. Neither contention has merit.

This Court has long recognized the validity of persistent felon statutes such as employed in Petitioner's case, most recently in *Rummel* v. *Estelle,* 445 U. S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). As Kentucky courts have noted the only issue in a persistent felon trial is whether or not the defendant has attained the status prescribed by the statute. *White* v. *Commonwealth,* Ky. App., 611 S. W. 2d 529 (1980); cert. denied by U. S. Supreme Court, 452 U. S. 966. (Appendix) Thus, the only evidence which the defense can introduce is evidence which infers that the defendant was not of age, had not been convicted of prior felonies or had not been discharged in the last five years. Evidence that the defendant might be of fine

character in the eyes of some persons is totally irrelevant and therefore inadmissible. *White, supra.*

Petitioner's reliance on *Eddings* v. *Oklahoma,* ___ U. S. ___, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982), and the companion cases of *Lockett* v. *Ohio,* 438 U. S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), and *Bell* v. *Ohio,* 438 U. S. 637, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 (1978), is misplaced. All three are limited holdings involving death penalty proceedings in which the prosecution had to show aggravating circumstances. The Court in *Eddings* discussed the *"Lockett* rule" extensively and noted that the rule allowing the introduction of mitigating evidence in death penalty cases arises from the "profound" differences between death and other penalties. (102 S. Ct. 869, 874) The above opinions simply do not go as far as Petitioner would wish. The Commonwealth submits that this Court's obvious recognition of the limitations of the *Lockett* rule is as sound as the rationale behind the rule.

Petitioner's claim is not a sufficient ground for review by this Court.

II.

There Was No Error of Due Process in the Nondisclosure of the Prosecutor's Notes of His Interview with Darrell Skaggs.

Petitioner contends that he was denied due process of law because the prosecutor's notes jotted down in an interview with Darrell Skaggs were not made available for his discovery. His contention apparently encompasses three related alleged violations:

1. the prosecutor failed to release exculpatory evidence despite Petitioner's timely request;
2. the trial judge failed to allow Petitioner to examine the Prosecutor's notes although they contained exculpatory information; and
3. the Petitioner was consequently unable to set forth evidence relevant to his defense and Skagg's credibility.

This issue was found to be meritless by the Supreme Court of Kentucky which did not explain its decision (Appendix).

This issue presents two separate but related aspects of the law which must be considered. First, was the prosecutor required under the rules of procedure to produce these notes before Petitioner cross-examined Skaggs? Second, did the notes contain exculpatory information which the prosecutor and the trial court were obliged to reveal?

Under Kentucky Rule of Criminal Procedure 7.26, as amended, the defense is able to discover notes made pursuant to an interview of a witness if the notes have been signed or initialed by him, or they are or purport to be a substantially verbatim statement by him. This rule is quite similar to the applicable federal rule, 18 U.S.C. 3500(e), which this Court has acknowledged as sound. *Goldberg* v. *United States*, 425 U. S. 94, 96 S. Ct. 1338, 47 L. Ed. 2d 603 (1976).

The notes taken by the prosecutor in regard to his interview of Skaggs met neither the criteria of Ky. RCr 7.26 nor the definition of "statement" as set forth

in the analogous federal statute. (See Transcript of Evidence, TE, Vol. III, 341-348, and Court's Exhibit #1) The trial court's determination was correct as a matter of state procedural law and should not be disturbed. *Patterson* v. *New York,* 432 U. S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

Thus, the prosecutor was not compelled under the rules of procedure to disclose the notes of his interview with Skaggs—in fact the rules prohibited him from doing so. But it must also be considered whether the notes contained evidence of an exculpatory nature which the prosecution was compelled to disclose in any circumstance.

Respondent feels that some prefatory remarks are in order before discussing the case law. Petitioner's defense was based upon both intoxication and insanity. There was a great deal of evidence indicating that he was a chronic alcoholic who had been in trouble with the law before as a result of his drinking. The defense examined several experts concerning the effects of chronic alcoholism. The experts generally agreed that although the chronic alcoholic usually requires more liquor than the average person to become thoroughly intoxicated, the chronic alcoholic in that state might certainly be unable to know what he is doing. Petitioner himself testified that he had been drinking heavily at the time of the crime, *but,* he knew he was doing something wrong and was conscious that he was carrying a lot of "stuff" out of the Buley's residence, although he could not explain his actions. (TE, Vol. III, 398-403, 458). The arresting officer also testified

that it was apparent Petitioner and his accomplice had been drinking but that it did not seem to substantially affect their behavior. (TE, Vol. V, 660-689). As the Supreme Court of Kentucky noted, the jury was properly instructed that they must believe Petitioner guilty of the crime beyond a reasonable doubt *and*, "That he was not so drunk that by reason of his drunkenness he did not have a conscious intention to commit [the named crimes]". (See Appendix.) The jury's verdict indicates that they did not believe Petitioner was so drunk that he lacked the ability to form the requisite intent.

This Court long ago recognized that it is improper for the prosecutor or the trial judge to suppress evidence favorable to the accused. *Brady* v. *Maryland*, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Since then the Court has given the *Brady* holding definition, most relevantly in *United States* v. *Agurs*, 427 U. S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

The import of the *Agurs* decision was recently well explained by the Fifth Circuit in *United States* v. *Mesa*, 660 F. 2d 1070 (5th Cir., 1981). See also *United States* v. *Irwin*, 661 F. 2d 1063 (5th Cir., 1981). The Court of Appeals stated in *Mesa, supra*, as follows:

> ". . . In *United States* v. *Agurs*, 427 U. S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the Court recognized three distinct types of situations in which the *Brady* doctrine applies and enumerated standards for determining materiality in each circumstance. First, where the prosecutor knows or should know that the conviction is based on

false testimony, a new trial is mandated if there is a reasonable likelihood that the false testimony could have effected the jury verdict. Second, if there is no disclosure of information despite a specific defense request, the test is whether the suppressed evidence might have affected the outcome of the trial. Finally, in the event of a general request for *Brady* material or no request at all, a new trial is necessary if the omitted evidence, when viewed in the context of the entire record, creates a reasonable doubt that did not otherwise exist. This circuit recognizes yet another circumstance in which *Brady* controls: when the prosecutor fails to disclose purely impeaching evidence not affecting a substantive issue and absent a specific defense request, relief will be granted only if the defendant can demonstrate that the undisclosed evidence probably would result in an acquittal. . . ." (p. 1076)

In the case at bar the prosecutor's note suggests that Skaggs thought Petitioner and his accomplice had been drinking. The question is whether this evidence is in some way exculpatory such that the prosecutor and the trial judge had an affirmative duty to give this information to defense counsel. Petitioner argues that such a duty did exist because of two factors, both of which can be analyzed under *Mesa*.

Petitioner argues first that had the defense known that Skaggs told the prosecutor that Petitioner and his accomplice appeared to have been drinking, defense counsel would have had a piece of evidence to introduce that would probably have made a difference in

the outcome. The Commonwealth can only speculate why defense counsel did not ask Skaggs directly whether Petitioner appeared intoxicated. Nonetheless, there was a great deal of evidence otherwise introduced to indicate Petitioner had been drinking—that fact was even acknowledged by the arresting officer.

The *Mesa* court, in its analysis of *Agurs, supra,* noted that the focus in such cases is on materiality which must be analyzed in view of the circumstances. Of the three analytic bases set forth in *Agurs,* the third seems most appropriate for application in this case, that is, would the omitted evidence, in light of the entire record, have created a reasonable doubt that did not otherwise exist? It is submitted that it did not and the evidence was therefore immaterial. Petitioner seems to forget that the trial court apparently agreed that there was sufficient evidence that he had been drinking to allow the defense to go to the jury—an instruction was given. The critical issue was not whether Petitioner was intoxicated but whether his condition rendered him unable to form the requisite criminal intent. Another bit of evidence that he had been drinking would have been cumulative, but not material to this critical issue. Evidence that Petitioner was able to carry on a discussion, steer a car off the road, answer the police officer's questions correctly, get a lot of "stuff" out of a strange house, drive from one town to another, could realize that when he took the "stuff" he knew he was doing something wrong—evidence of Petitioner's words, deeds and mental impressions at the time of the crime which

are probative of the critical issue are material. The revelation of the notes would not have created a reasonable doubt otherwise not present and the outcome would have been no different.

Petitioner also contends that the information in the notes was exculpatory because it could have been used to impeach Skagg's testimony. The colloquy he cites on pages 15-16 of the petition was not the giving of false testimony. The answers were straightforward responses to the questions asked and were consistent with the rest of the testimony. Petitioner argues that it created an impression of his condition at the time which the prosecutor knew to be false and thus impeachable. The Commonwealth submits that the cited dialogue is innocuous. Ironically, Petitioner argues here that Skaggs was lying about Petitioner's outward condition by this testimony, while at trial the defense took pains to elicit expert testimony to the effect that a chronic alcoholic might appear totally normal while being in fact thoroughly intoxicated (Note Q. and A. "30" closely).

The *Mesa* Court's opinion does not address this exact circumstance but for good reason. Skagg's testimony was not impeachable because nothing in his testimony, or in that of the other witnesses, was necessarily inconsistent with the fact that Petitioner probably had been drinking. Herein lies the fallacy of Petitioner's reasoning throughout this case. He wishes this Court to find, as he did the courts below, that if he was drunk he is innocent of the crimes. However, the defense of intoxication is not that simple. If it

were, chronic alcoholics would be excused automatically as a matter of law from criminal acts committed while intoxicated.

This Court should not grant review of Petioner's case on the basis of this issue. The Petition does not present a sufficient case of constitutional violation and there has been no showing that any opinion of this Court has been misconstrued by the Supreme Court of Kentucky.

CONCLUSION

WHEREFORE, the Respondent, Commonwealth of Kentucky, prays that the Court not issue a writ of certiorari to review this case as Petitioner has not stated a sufficient basis for review pursuant to Rule 17(1)(b).

Respectfully submitted,

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PROOF OF SERVICE

I, George M. Geoghegan, Jr., one of counsel for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of July, 1982, I served the petitioner with Respondent's Brief in Opposition to Petition for Certiorari by placing three copies of the same in the United States Mail, first class postage prepaid, and addressed to Hon. David W. Lamar, 422 Frederica Street, Owensboro, KY 42301, Counsel for Petitioner.

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APPENDIX

RENDERED DATE—FEBRUARY 16, 1982
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

81-SC-192-MR
81-SC-193-MR

WILLIAM ORVILLE CAPPS, and
JOHNNY LAWRENCE CAPPS - - - - *Appellants*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Henderson Circuit Court
Hon. Carl D. Melton, Judge

MEMORANDUM OPINION OF THE COURT
REVERSING IN PART
AFFIRMING IN PART

William Capps and his brother, Johnny, appellants, were each convicted of first degree burglary and theft by unlawful taking. Each was sentenced to ten years for burglary and two years for theft. They were then convicted as first degree persistent felony offenders, and their sentences were enhanced to twenty years for burglary and ten years for theft. Their appeals are before us as a matter of right.

Sometime after 7:00 p.m. on June 16, 1980, Mrs. Jolene Buley was mowing the grass in her yard. When she went around to the front of her house she saw a strange car parked in the driveway. She noticed that the front door of her house was open. The car was an older model white Chevrolet with a McLean County license. The motor of the

car was running and Mrs. Buley saw certain items of her family's personal property inside the vehicle. She turned off the motor, removed the keys, and she and her son went to an outbuilding and called the sheriff. When he arrived, Mrs. Buley gave him the keys she had removed and described the car, in detail. Brian Buley, her son, witnessed two men leaving his home and his description matched that of appellants. Within ten to fifteen minutes of leaving the Buley residence, a deputy sheriff proceeded to a location about one and one-half miles from the Buley residence where he located the same automobile parked off the main road. Appellants were standing near the vehicle and they matched the description of the two men given by Brian Buley. The sheriff identified the Buley's personal property in the car and he used the keys removed by Mrs. Buley to start the car. It is beyond doubt that appellants committed the burglary and the theft.

Both appellants testified in their own behalf. Johnny Capps presented the defenses of insanity and intoxication. William Capps also pled intoxication. Following both the close of the Commonwealth's evidence and that of appellants', motions for a directed verdict of acquittal were denied by the trial court.

Although appellants raise seventeen allegations of error, we will discuss only those that have any merit.

I. DID THE TRIAL COURT ERR IN OVERRULING APPELLANTS' MOTIONS FOR A DIRECTED VERDICT?

The basis of this argument is the appellants' claim that there was "overwhelming" evidence that both appellants were intoxicated at the time of the commission of the crimes and therefore did not have the requisite intent to commit crimes.

Johnny Capps, by his own testimony and the testimony of a psychologist and a psychiatrist, established that he had a long-standing drinking problem. The two experts testified that, if Johnny were under the influence, he would not be able to "control his impulsiveness" and would be unable "to understand his own actions or his wrongness." However, witnesses for the Commonwealth testified that shortly after the crime Johnny was speaking well and appeared normal. Moreover, Johnny admitted he knew he was doing something wrong.

William attempted to show, by his testimony and by that of a psychiatrist, that he was an alcoholic. He also testified that he did not remember anything about being at the Buley residence and committing the crimes. The Commonwealth's evidence rebutted William's testimony that he was intoxicated at the time.

In the final analysis, the jury, after hearing the conflicting testimony as to intoxication of both appellants, chose to believe that of the Commonwealth. We cannot say that the evidence presented was of such nature as to require a directed verdict. Under these circumstances the trial court was correct in denying a directed verdict. *Trowel* v. *Commonwealth*, Ky., 550 S. W. 2d 530 (1977).

II. DID THE TRIAL COURT ERR IN FAILING TO GIVE A SEPARATE INSTRUCTION ON VOLUNTARY INTOXICATION?

At the close of the testimony, appellants tendered an instruction on the defense of intoxication. The trial court refused to give a separate instruction, but did incorporate the defense in the instructions which delineated the elements necessary to sustain a conviction of burglary and theft. Following a listing of those requirements the trial court instructed the jury that in order to convict each ap-

pellant it was necessary for the jury to find, "That he was not so drunk that by reason of his drunkenness he did not have a conscious intention to commit [the named crimes]."

Appellants argue that the placing of the intoxication instruction within the body of the so-called "offense" instruction was error. It is argued that a separately located instruction is required. *Pace* v. *Commonwealth*, Ky., 561 S. W. 2d 664 (1978) is cited as authority for that proposition. We do not agree. In *Pace*, the appellant, in defending a murder charge, claimed that the evidence justified the giving of an instruction on accidental killing and also one on self-protection. The trial court refused to give a separate complete instruction on self-protection and simply added, in the manslaughter offense instruction, that before the jury could find her guilty they would have to find that, when she shot the victim, "in so doing she was not privileged to act in self-protection." *Id.*, at 668. In declaring the trial court in error, a majority of this Court found that the evidence did require the giving of a complete and proper instruction on self-protection and further ruled that the reference made in the offense instruction "was not adequate in this regard." The reference given was described as "straddling the fence", and, because it did not completely define the law; the trial court had erroneously "left it up to the jury to determine the law." *Id.* The decision was based on the content of the instruction and not its location. It was simply unclear.

In the case at bar, the instruction properly places the burden on the Commonwealth to prove that the appellants were not drunk. It expresses the essence of the intoxication statute, KRS 501.080(1), and its placement in the offense instruction called the attention of the jury to *all elements of the crime* and the resulting burden of proof on the Commonwealth. We find no error or prejudice here.

III. DID THE TRIAL COURT ERR WHEN IT REFUSED TO GIVE AN INSTRUCTION ON SECOND DEGREE BURGLARY WHICH REFLECTED A LEGISLATIVE CHANGE OF PUNISHMENT?

The date appellants committed the burglary was June 18, 1980. On that date, KRS 511.020 read in pertinent part as follows: "A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling. . . ." The offense was declared to be a Class B felony and carried a punishment of ten to twenty years' imprisonment. On July 15, 1980, before appellants were indicted, burglary of a dwelling became a second degree burglary, under KRS 511.030, which defines the offense as a Class C felony, and the sentence was reduced to a period of five to ten years.

At the trial, appellants tendered a second degree burglary instruction which reflected the change in the statute. Citing the fact that the crimes were committed while the old statute was in effect, the trial court refused the instruction.

Appellants argue that the trial court erred, in view of KRS 446.110:

> 446.110. OFFENSES COMMITTED AND RIGHTS ACCRUING PRIOR TO REPEAL OF LAW.
>
> No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, except that the proceedings thereafter shall conform, so far as practicable to the laws in

> force at the time of such proceedings. *If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.* (Emphasis added)

It is argued that since the *penalty* was mitigated by the amendment, and since appellant had "consented" to such a mitigated penalty by virtue of their tendered instructions, the statute requires the lesser penalty to be given. We agree.

KRS 446.110 was enacted to abrogate the old common law rule which held that the repeal of a statute by the legislature also repealed the power of the courts to enforce penalties enacted thereunder. *Commonwealth* v. *Louisville & N. R. Co.*, Ky., 215 S. W. 938 (1919); *Acree & Kinman* v. *Commonwealth*, Ky., 13 Bush 353, (1877). Moreover the statute, in its last sentence, provides that when a subsequent statute provides that the previous punishment is mitigated, the defendant is entitled to the benefit of said lesser punishment. *Kinser* v. *Commonwealth*, Ky., 205 S. W. 951 (1918). In *Coleman* v. *Commonwealth*, Ky., 169 S. W. 595 (1914), we said that it would be less confusing and less uncertain if the statute in force when the offense was *committed* were followed. However, KS 465 (the predecessor of KRS 446.110), provides that if the punishment provided in the second statute "definitely" mitigates that in the first statute, and if the defendant consents, the judgment should be given under the new law. In commenting on the last sentence of the statute, we said in *Coleman* that it:

> only applies to states of case in which the penalty, forfeiture, or punishment is definitely mitigated by the provisions of the new law, and that, when it is so

> mitigated, the defendant can only avail himself of its provisions by consenting that judgment may be pronounced under the new law. . . .
> *Id.*, at 597.

In the case at bar, it is clear that the punishment of the crime was reduced from a range of ten to twenty years to a range of five to ten years by the statute which became effective on July 15, 1980, some time after the commission of the crime. Moreover, not only did the appellants *consent* to trial under the new statute, they *specifically* requested an instruction incorporating the mitigated punishment of the new statute. The factual situation here is precisely within the ambit of the statute. See also, *Earl* v. *Commonwealth*, Ky., 261 S. W. 239 (1924).

Under these circumstances, we hold that the trial court erred in refusing to grant such instruction. In the event of a new trial, appropriate instructions will be given.

The burglary convictions and the persistent felony convictions, based thereon, are hereby reversed. The convictions of theft by unlawful taking are affirmed, and the persistent felony convictions, based thereon, are affirmed. The case is remanded to the trial court with instructions to enter judgment in conformity with this opinion.

All concur.

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COURT OF APPEALS OF KENTUCKY

JAMES MICHAEL WHITE, - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

November 14, 1980

DISCRETIONARY REVIEW DENIED — March 3, 1981.

Defendant was convicted in the Christian Circuit Court, Stephen P. White, Jr., J., of trafficking in a controlled substance and of being a persistent felony offender, and he appealed. The Court of Appeals, Cooper, J., held that: (1) refusal to allow defendant to introduce mitigating evidence on charge of being a persistent offender was not violative of his rights to due process; (2) defendant did not have a constitutional right to inform jury about strict nonparole provisions contained in persistent offender statute; (3) response of Commonwealth that it had no written or recorded statements made by defendant, if misleading, was not attributable to actions of Commonwealth; (4) impartiality of proceedings was not tainted by misconduct of prosecutor during trial and in summation of evidence; (5) refusing to instruct jury on a lesser included offense during guilt phase of trial was not error; (6) error with respect to failure to prove defendant's age at time of offenses with respect to persistent offender charge was not preserved for review; and (7) restrictions of defendant's voir dire examination of jury panel did not deny defendant his basic right to a fair and impartial trial.

Affirmed.

1. Criminal Law, Key 1202(3)

Refusal to allow defendant to introduce mitigating evidence on charge of being a persistent felony offender was not error in that sole issue to be determined was that of status, that is, whether defendant met statutory definition of being a persistent felony offender, and character evidence was irrelevant and and immaterial to that determination in that it neither proved nor disproved status. KRS 532.080.

2. Constitutional Law, Key 270(4)

Defendant was not denied due process by reason of fact that trial court precluded him from informing jury about strict nonparole provision contained within persistent offender statute. KRS 532.080, 532.080(7); U.S.C.A. Const. Amend. 14.

3. Criminal Law, Key 1202(1)

The persistent offender stage of a trial is designed to avoid creating an unfair influence upon the question of the guilt or innocence of the defendant with respect to the current charge, but is not designed to provide a separate sentencing phase where mitigating or aggravating factors surrounding the charge can be presented. KRS 532.080.

4. Criminal Law, Key 982.1

Pardon and Parole, Key 1

Probation and parole are not constitutional rights, but, rather, are legislative clemencies granted as a matter of grace.

5. Criminal Law, Key 627.7(1)

Oral statements and conversations do not come within scope of discovery; only written statements and convictions are discoverable. RCr 7.24(2).

5. Criminal Law, Key 627.7(2)

The Commonwealth was not required to provide defendant with any and every oral statement he made to any of the witnesses involved; its response that it had no written or recorded statement made by the defendant was technically correct, and if the defendant was misled in that respect, it was not attributable to the actions of the Commonwealth. RCr 7.24(2).

7. Criminal Law, Key 730(1)

Defendant was not denied a fair and impartial trial as a result of the misconduct of the prosecutor both during the trial and summation of the evidence in that the specific allegations of misconduct were, at the time of the trial, objected to by counsel for the defendant and sustained by the trial court, thus precluding the defendant from arguing that misconduct tainted impartiality of proceedings, and alleged misconduct of prosecutor with respect to closing remarks was not supported by record. RCr 9.22.

8. Criminal Law, Key 713

Ambiguous remarks of prosecutor on closing argument should not be construed to have its most damaging meaning in that such remarks are clearly in category of argument rather than evidence.

9. Criminal Law, Key 795(1)

Trial court did not err in refusing to instruct jury on a lesser included offense during guilt phase of trial, where governing statutes pertained to separate, distinct offenses, one being a narcotic and one being a nonnarcotic, and only evidence presented during trial with respect to substance allegedly sold by defendant was that it was a Schedule II narcotic. KRS 218A.990(1, 2).

10. Criminal Law, Key 1202(7)

Alleged error appearing by reason of fact that, with respect to charge of being persistent felony offender, defendant's age at time offenses were committed was not proved was not subject to review where error was not preserved in that no motion for directed verdict was made at close of persistent felony offender charge.

11. Criminal Law, Key 1035(6)

Alleged error on part of trial court in restricting defendant's voir dire examination of jury panel was not preserved for review where defendant failed to object to those restrictions in trial court. KRS 218A.990(1, 2).

12. Jury, Key 131(4)

Trial court's restrictions of defendant's voir dire examination of jury panel were well within scope of rule and did not deny defendant his basic right to a fair and impartial trial. RCr 9.38.

Jack Emory Farley, Public Advocate, Kevin McNally, Asst. Public Advocate, Frankfort, for appellant.

Steven Beshear, Atty. Gen., Victor Fox, Asst. Atty. Gen., Frankfort, for appellee.

Before Breetz, Cooper and White, J.J.

Cooper, Judge.

This is an appeal from a judgment convicting the appellant of trafficking in a controlled substance and convicting him of being a persistent felony offender. KRS 218A.990(1); KRS 532.080. The appellant was sentenced to ten years and eleven years respectively, ten of those years without parole. The principal issues raised herein are whether the appellant's due process rights were denied by (1) the trial court's refusal to allow the introduction

of mitigating evidence with respect to the charge of being a persistent felony offender; (2) pre-trial discovery responses on the part of the Commonwealth; (3) prosecutorial misconduct; (4) the trial court's refusal to instruct the jury with respect to the non-parole limitations of KRS 532.080(7); (5) the trial court's refusal to instruct the jury under KRS 218A.990(2); (6) the absence of proof of all elements of the charge of being a persistent felony offender; and (7) the trial court's restriction on voir dire examination. On review, we affirm.

The appellant, James Michael White, was indicted in December of 1979 for trafficking in a controlled substance — Schedule II — dilaudid. The appellant was charged with selling a quantity of the drug to an undercover police officer in August of 1979. KRS 218A.070 and KRS 218A.990(1). Additionally, he was charged with being a persistent felony offender. KRS 532.080. The appellant was tried by a jury in January of 1980, and convicted of both charges. He was sentenced to ten years on the first charge, and eleven years on the second. It is from this judgment that he now appeals.

[1] Initially, the appellant argues that he was denied both federal and state constitutional rights of due process in that the trial court refused to allow him to introduce mitigating evidence on the charge of being a persistent felony offender. In effect, he argues that he should have been allowed to introduce evidence by a psychologist and members of his family as a defense to the charge. We reject this argument. The sole issue to be determined in a persistent felony offender phase of a trial is that of status; that is, does the accused meet the statutory definition of being a persistent felony offender. Evidence which supports or refutes the determination of that status is therefore admissible. Conversely, character evidence such as that sought to be introduced here is inadmissible in that it neither

proves nor disproves the status. This clearly is irrelevant and immaterial to the question involved. *See Hardin* v. *Commonwealth*, Ky., 573 S. W. 2d 657 (1978). To admit such character evidence would, in effect, be to grant the appellant a retrial on past felony convictions. This cannot be done. *Allen* v. *Commonwealth*, 272 Ky. 533, 114 S. W. 2d 757 (1938).

[2-4] In a related argument, the appellant argues that he was denied due process in that the trial court precluded him from informing the jury about the strict non-parole provision contained within KRS 532.080(7). The trial court acted correctly. The purpose of bifurcating the persistent felony offender stage of a trial is to avoid creating an unfair influence upon the question of the guilt or innocence of the defendant with respect to the current charge. Yet, this proceeding is not designed to provide a separate sentencing phase where mitigating or aggravating factors surrounding the charge can be presented. KRS 532.080 precludes certain types of clemency. Probation and parole are not constitutional rights, but, rather, are legislative clemencies granted as a matter of grace. Consequently, we do not believe that the appellant had a constitutional right to inform the jury about the strict limitations of the statute.

[5, 6] Secondly, the appellant argues that he was denied due process as a result of the Commonwealth's misleading responses to certain discovery requests. Specifically, he argues that the Commonwealth failed to inform him that the police officer involved had handwritten notes, and that an oral statement had been made by the appellant to that officer. Under RCr 7.24, oral statements and conversations do not come within the scope of discovery. Only written statements and confessions are discoverable. Therefore, the Commonwealth's response that it had no written or

recorded statements made by the defendant was technically correct. Clearly, the Commonwealth was not required to provide the appellant with any and every oral statement he made to any of the witnesses involved. Furthermore, RCr 7.24(2) specifically prohibits from discovery the notes of a police officer or agent of the Commonwealth. Again, the response to the request was technically proper. If the appellant were mislead in this respect, it is not attributable to the actions of the Commonwealth.

[7, 8] Thirdly, the appellant argues that he had denied a fair and impartial trial as the result of the misconduct of the prosecutor, both during the trial and the summation of the evidence. On review, we find that the alleged misconduct did not deny the appellant a fair and impartial trial. Specific allegations of misconduct were, at the time of the trial, objected to by counsel for the appellant and sustained by the trial court. Accordingly, the appellant cannot argue that such misconduct tainted the impartiality of the proceedings. *Brown* v. *Commonwealth*, Ky., 449 S. W. 2d 738 (1969); RCr 9.22. Furthermore, the alleged misconduct of the prosecutor with respect to his closing remarks is clearly not supported by the record. An ambiguous remark should not be construed to have its most damaging meaning. *Donnelly* v. *De Christoforo*, 416 U. S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Closing remarks are clearly in the category of argument rather than evidence. Therefore, the prosecutor, as well as the defense attorney, should be given some latitude in this respect.

[9] Fourthly, the appellant argues that the trial court erred in refusing to instruct the jury on a lesser included offense during the guilt phase of the trial. KRS 218A.990 (1), (2). We reject this argument. KRS 218A.990(2) is not a lesser included offense to that set forth in KRS 218A.-990(1). They pertain to separate, distinct offenses, one

being a narcotic and one being a non-narcotic. The only evidence presented during the trial with respect to the substance allegedly sold by the appellant was that it was a Schedule II narcotic. Consequently, the trial court did not err in refusing to accept appellant's instruction on a lesser included offense.

[10] Sixthly, the appellant argues that he was denied due process with respect to the charge of being a persistent felony offender in that an essential element of that offense —the age of the appellant at the time the offenses were committed—was not proved. Although the record reflects the fact that this element may not have been proved, there was no preservation of error for review. No motion for directed verdict was made at the close of the persistent felony offender stage. *Crawley* v. *Kunzman*, Ky., 585 S. W. 2d 387 (1979). Although situations exist in which it would be a manifest injustice for a reviewing court to decline to review an error, even though such error had not been preserved for review, we do not believe this constitutes one of those situations. *Stone* v. *Commonwealth*, Ky., 456 S. W. 2d 43 (1970).

[11, 12] Finally, the appellant argues that he was denied due process of law in that the trial court restricted his voir dire examination of the jury panel. Although the appellant tendered instructions to the trial court, no ruling was requested by him. RCr 9.22. Furthermore, the appellant failed to object to the trial court's restrictions of the voir dire examinations. More importantly, the trial court's restrictions were well within the scope of RCr 9.38, and did not deny the appellant the basic right to a fair and impartial trial.

The judgment is affirmed.

All concur.